## STATE OF MICHIGAN

## COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

UNPUBLISHED January 10, 2008

Plaintiff-Appellee,

 $\mathbf{v}$ 

REGINALD WHITLOW,

Defendant-Appellant.

No. 274835 Wayne Circuit Court LC No. 06-008201-01

Before: Fitzgerald, P.J., and Markey and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right from his sentence of 96 to 180 months in prison imposed on his conviction of assault with intent to do great bodily harm less than murder, MCL 750.84. We affirm defendant's sentence, but remand for entry of an amended judgment of sentence. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was charged with assault with intent to murder, MCL 750.83, felonious assault, MCL 750.82, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. The prosecution also sought sentence enhancement pursuant to MCL 769.12, fourth or subsequent felony conviction.

Defendant was convicted by a jury of assault with intent to do great bodily harm less than murder as a lesser included offense of assault with intent to commit murder, felonious assault, felon in possession of a firearm, and felony-firearm. The sentencing guidelines for assault with intent to do great bodily harm less than murder, adjusted for defendant's status as a fourth habitual offender, recommended a minimum term range of 34 to 134 months. The trial court sentenced defendant to concurrent prison terms of 96 to 180 months for assault with intent to do great bodily harm less than murder, 32 to 48 months for felonious assault, and 40 to 60 months for felon in possession of a firearm, and to a consecutive two-year term for felony-firearm. The judgment of sentence stated that defendant's sentences for assault with intent to do great bodily harm less than murder, felonious assault, and felon in possession of a firearm were consecutive to each other and to the sentence for felony-firearm. The judgment also indicated that defendant was entitled to credit for 423 days served in jail.

Defendant argues that he is entitled to be resentenced on his conviction of assault with intent to do great bodily harm less than murder because the 15-year maximum term imposed by the trial court exceeded the ten-year maximum term allowed by statute. MCL 750.84. In

addition, defendant argues that he is entitled to an amended judgment of sentence because the original judgment erroneously indicates that his sentences are consecutive to each other. We affirm defendant's sentence for his conviction of assault with intent to do great bodily harm less than murder, but remand for entry of an amended judgment of sentence.

The statutory sentencing guidelines for the conviction of assault with intent to do great bodily harm less than murder recommended a minimum term range of 34 to 67 months. MCL 777.65. However, because defendant was to be sentenced as a fourth habitual offender, the upper limit of this range was increased by 100% to 134 months. MCL 777.21(3)(c). The sentencing information report reflects this adjustment and defendant's minimum term of 96 months falls within the adjusted range. Defendant's status as a fourth habitual offender permitted the trial court to impose a sentence of life or a lesser term for the conviction of assault with intent to do great bodily harm less than murder. MCL 769.12(1)(a). Hence, defendant's sentence of eight to 15 years for assault with intent to do great bodily harm less than murder was within statutory limits and did not violate the two-thirds rule stated in *People v Tanner*, 387 Mich 683; 199 NW2d 202 (1972). The sentence is not invalid. *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997).

The trial court entered an amended judgment of sentence that stated that defendant's sentences for assault with intent to do great bodily harm less than murder, felonious assault, and felon in possession of a firearm are concurrent with each other, and consecutive to the sentence for felony-firearm. The amended judgment eliminates any reference to jail credit, but instead specifies a beginning date of August 2, 2006, for defendant's sentences. Finally, the amended judgment indicates that defendant was sentenced as a second habitual offender, MCL 769.10. But defendant was not charged as a second habitual offender. This clerical error can be corrected without conducting a resentencing hearing. MCR 6.435(A).

Defendant's sentence for assault with intent to do great bodily harm less than murder is affirmed. However, we remand for entry of an amended judgment of sentence reflecting defendant's conviction as a fourth habitual offender. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald /s/ Jane E. Markey /s/ Michael R. Smolenski

1

<sup>&</sup>lt;sup>1</sup> The record indicates that defendant was arraigned on the information on August 2, 2006.

<sup>&</sup>lt;sup>2</sup> We note that defendant's maximum term of 15 years for his conviction of assault with intent to do great bodily harm less than murder would be a permissible maximum sentence for one convicted either as a second habitual offender, MCL 769.10(1)(a), or as a fourth habitual offender. MCL 769.12(1)(a).